Supreme Court, U.S.
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No. 97-23

In The

Supreme Court of the United States

October Term, 1996

STEPHEN L. GOEWEY, by his next friend, JULIE A. GOEWEY and KEVIN D. GOEWEY,

Petitioners,

vs.

FLUOR DANIEL, INC., FD SERVICES, INC. and UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FLUOR DANIEL, INC. AND FD SERVICES, INC.

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QUESTIONS PRESENTED

1. Should this case be held in abeyance for a decision on the issue of the appropriate standard of review of a trial court's *Daubert* rulings, an issue that is before this Court in *General Electric Co. v. Joiner*, (*cert. granted* March 17, 1997) (No. 96-188)?

2. Is the Fourth Circuit's decision affirming the order granting summary judgment on the basis of the insufficiency of the evidence on causation in conflict with decisions of this Court or another United States Court of Appeals so as to warrant this Court's exercise of its discretionary review power?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding. Respondents Fluor Daniel, Inc. and FD Services, Inc. are subsidiaries of Fluor Corporation.

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STATEMENT OF THE CASE

Petitioners brought this personal injury lawsuit against Fluor Daniel and its affiliated corporation, FD Services (collectively "FD"), Velsicol Chemical Corporation, and the United States of America, alleging that their child, Stephen Goewey, sustained neurological damage as the result of exposure to toxic chemicals at their home in Goose Creek, South Carolina. The issue in the district court and the Court of Appeals was causation. One of Petitioners' expert witnesses described it as a "very difficult neurological, medical issue." JA 542.[1] After exploring different theories offered by Petitioners' experts, FD moved for summary judgment on the issue of causation.[2] Utilizing the guidelines set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the district court evaluated various theories offered by Petitioners' experts, excluded most of their opinions on causation, and granted the motion for summary judgment. The Fourth Circuit carefully reviewed the evidence, reviewed the district court's evidentiary rulings for abuse of discretion, affirmed the district court's evidentiary rulings, assessed the sufficiency of the evidence that remained, and affirmed the grant of summary judgment.

The petition raises two issues, neither of which warrants a grant of certiorari. First, it requests that this case be held in abeyance for a decision on the issue of the appropriate standard of appellate review of a district court's *Daubert* rulings, which is currently before this Court in *General Electric Co. v. Joiner*,

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1. "JA __." refers to the Joint Appendix in the Court of Appeals. "App. __a." refers to the Appendix of the Petition for a Writ of Certiorari. "Pet. at __." refers to the Petition for a Writ of Certiorari.

2. Petitioners settled with Velsicol. The district court granted the USA's motion to dismiss, a decision that was affirmed by the Fourth Circuit and is not now challenged.

(*cert. granted* March 17, 1997) (No. 96-188). This issue was not raised in the Fourth Circuit, so it should not be a basis for either holding this case or granting certiorari. In addition, the district court's evaluation of expert testimony was consistent with *Daubert* and, accordingly, provides no cause for review. The second issue relates to the grant of summary judgment. Petitioners claim that because some of their expert testimony on causation was not excluded, summary judgment was improper, and the Fourth Circuit's decision is in conflict with the decisions of this Court and other circuit courts of appeals on this point. On the contrary, the Fourth Circuit's decision regarding the sufficiency of the evidence on causation is consistent with the well-established principle, unaltered by *Daubert*, that a factual dispute must be genuine in order to create a jury issue. This Court indicated in *Daubert* that summary judgment on causation in a case involving scientific evidence can be appropriate even if the party opposing the motion presents some evidence, if the evidence is insufficient to allow a reasonable juror to find in its favor. The Fourth Circuit properly decided this factbound issue. Like the standard of review issue, the summary judgment issue does not warrant this Court's exercise of its discretionary review power.

Background. This case initially began as a pesticide poisoning case. App. 21 n.5. However, the focus shifted from pesticides to an incident that has become known to the parties as the "tar incident," when 80%-85% of Stephen Goewey's body was briefly covered with Lowe's Asphalt Fibered Roof Coating that had been applied to Petitioners' residence by FD Services, a U.S. Navy maintenance contractor, to stop a foundation leak. Over four months after the tar incident, Stephen's mother, Julie Goewey, called the Charleston Naval Hospital and reported for the first time that Stephen had been falling. JA 1500. Within the next year, Stephen was hospitalized twice at the National Naval Medical Center in Bethesda, Maryland, where he was in the care of Dr. Judith Morales, a pediatric neurologist, and twice at

Duke University Medical Center, where he was in the care of Dr. Robert DeLong, Chief of Pediatric Neurology. Both Dr. Morales and Dr. DeLong knew about the tar incident. JA 208, 438. Neither could find any scientific evidence linking the exposure to Stephen's neurological problems. JA 209, 438.

In support of the motion for summary judgment, FD relied on the testimony of Dr. Morales and Dr. DeLong as well as other treating physicians and retained experts who could not find a link between the roof coating and Stephen's neurological condition and placed him in a category of children with neurological disorders, the causes of which cannot be determined. App. 39a-40a.

Petitioners did not present any studies or data establishing a causal link between the roof coating and Stephen's condition; in fact, one of their experts conducted extensive research and was unable to find another case involving this type of medical presentation. JA 544. Instead, Petitioners relied on the testimony of the following witnesses:

Lorne Garrettson, M.D. (Pediatrician/Toxicologist). Dr. Garrettson's analysis of the chemicals in the roof coating revealed nothing that would account for Stephen's condition. JA 279; App. 39a. The "tar" component (asphalt) has "a very low toxicity in humans. . . ." JA 271-272; 280. The solvent portion has nothing "that would in any way impact on Stephen's illness." JA 300-303. Instead, the course and pattern of the illness might be compatible with organophosphate-induced delayed neurotoxicity (OPIDN) caused by exposure to triorthocresyl phosphate (TOCP). JA 259. However, Dr. Garrettson had no evidence of Stephen's exposure to TOCP through the roof coating (App. 7a; 35a), and he acknowledged that the onset of Stephen's neurological condition (months) is inconsistent with the scientific evidence on TOCP (days or

weeks). App. 36a; JA 307. He attempted to explain the timing problem as a result of dermal rather than oral absorption, but he could produce no scientific evidence to support this hypothesis. JA 307. With regard to exposure, he speculated about the "possibility" that TOCP may have been added by one of the workers who applied the roof coating. App. 35a. If there was no TOCP in the roof coating, Dr. Garrettson's alternate opinion is that Stephen's OPIDN was caused by chlorpyrifos, an organophosphate insecticide used in Petitioners' home with which FD had no connection. JA 281.

Mohamed Abou-Donia, Ph.D. (Toxicologist/Research Chemist). Dr. Garrettson turned to Dr. Abou-Donia to find a marker of organophosphate poisoning in Stephen. Dr. Abou-Donia was in the midst of a research project involving the development of a test for detection of phosphorylated neurofilaments in the bloodstream. JA 378. Theoretically, his test can identify a phosphate, but not a specific organophosphate such as TOCP.[3] JA 258. Dr. Abou-Donia has not published his test results on humans because this is the first case in which he has ever tried it on a human. App. 35a-36a. All of his previous work involved chickens. App. 36a. The chickens developed ataxia within 6-14 days of exposure to TOCP. This is the "classic delay period" in humans as well. App. 36a; JA 387-388. With respect to this case, Dr. Abou-Donia, like Dr. Garrettson, had no personal knowledge that the roof coating contained TOCP. App. 7a.

Robert Simon, Ph.D. (Toxicologist). Petitioners attempted to obtain evidence of exposure to TOCP through Dr. Simon. Over four years after the incident, Dr. Simon was asked to try to find TOCP on a shirt, allegedly worn by Mrs. Goewey at the

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3. The petition claims that a positive test result is a sign of exposure to TOCP. Pet. at 8. Dr. Garrettson explained that the test cannot distinguish between phosphates, such as TOCP and chlorpyrifos. JA 258.

time of the tar incident, which had since been laundered several times. However, the test results were "not confirmatory." App. 7a; 36a-37a.

Dr. Simon, "the chlordane doctor" (JA 1009), initially was a proponent of a pesticide theory of causation. App. 36a. He later switched to a "toxic soup" theory that included TOCP. JA 924-925. For evidentiary purposes, Dr. Simon acknowledged that he is not qualified to give an opinion on the issue of medical causation because he is not a physician. JA 906-907.

Peter Bernad, M.D. (Neurologist/Toxicologist). Dr. Bernad extensively researched the scientific literature and was unable to find a case like this one. JA 544. He testified that Stephen's illness is not consistent with exposure to any one chemical or combination of chemicals, including the chemicals found in the roof coating, and it is also inconsistent with exposure to TOCP. App 39a; JA 526-527, 530-531, 543.[4] Confronted with no apparent explanation for this "very difficult neurological, medical issue," Dr. Bernad speculated that Stephen may have been asphyxiated by the roof coating: "And I think *one must speculate* that there was this other element, this hypoxic ischemic event, if you will." JA 532. (Emphasis added). The hypoxia theory was conclusively disproved (App. 37a), and it is virtually disregarded in the petition.[5]

David Hartman, Ph.D. (Neuropsychologist). In an attempt to find an explanation for this case, Dr. Hartman

4. Drs. Garrettson, Abou-Donia and Bernad agreed that exposure to TOCP would be unusual in modern American society. JA 308, 394, 504.

5. The petition misrepresents Dr. Bernad's testimony when it characterizes hypoxia merely as a possible alternative to a toxic insult. Pet. at 10. As the district court and the Fourth Circuit noted, hypoxia is a major component of his opinion. App. 8a-9a; 37a-38a.

researched unconventional scientific literature on coal tar. JA 1125-1126. Unfortunately, Lowe's Asphalt Fibered Roof Coating is not a coal tar product (JA 1514-1515, 1518), and the proposition which the research sets out to prove, that coal tar derivatives cause Parkinson's Disease, is not at issue in this case. App. 38a.

Dr. Hartman prepared a report in which he summarized Petitioners' theories as TOCP, pyridines (his theory), hypoxia and toxic soup. JA 1176-1179. He then attempted to "wrap up" the disparate theories and contradictory testimony presented by Petitioners' expert witnesses. App. 38a; Pet. at 11. Even so, he acknowledged that there is no evidence to support Dr. Bernad's hypoxia theory. App. 39a.

Allan Lieberman, M.D. (Pediatrician). Dr. Lieberman's opinion is that this case involves "chlorinated hydrocarbons" (chlordane) or toluene, a component of the roof coating product. App. 9a. His theory is not included in the summary compiled by Dr. Hartman, the "wrap up" expert. App. 38a. Dr. Lieberman rejected Dr. Garrettson's theory that this is a case of organophosphate poisoning. JA 480.

THE DISTRICT COURT'S DECISION. Exercising its gatekeeping responsibility under *Daubert*, the district court analyzed the reasoning and the methodology of the expert witnesses presenting Petitioners' multiple theories on causation.[6] App. 34a-38a. The court made the following rulings:

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6. The petition misrepresents the district court's order when it states, in two separate places, that the district court only considered the TOCP theory. Pet. at 11, 16. The petition is confusing on this point, because it also states that the court "focused on the different toxic substances considered by plaintiffs' experts. . . ." Pet. at 12. What the district court actually said was that TOCP was the "current theory of liability. . . ." App. 34a. In any event, it is clear from the order that the district court considered multiple theories.

• The TOCP theory and the opinions of its proponents, Drs. Garrettson and Abou-Donia, were excluded because of flaws in the underlying methodology. The court noted that Drs. Garrettson and Abou-Donia were unable to provide evidence of exposure, a necessary component of the four step toxicological methodology established by Dr. Garrettson.[7] Additionaly, the manufacturer does not use TOCP in the roof coating, and the workers did not add TOCP to it. Petitioners unsuccessfully attempted to establish exposure through Dr. Simon, whose gas chromatograph analysis on Mrs. Goewey's shirt was inconclusive and whose methodology was deemed unreliable. The court ruled out Dr. Abou-Donia's monoclonal antibody assay test because it had never before been used on a human being, had never been published or peer reviewed, and was criticized by one of Petitioners' other experts. The court also noted that the course and pattern of Stephen's illness was inconsistent with the scientific evidence on the effects of TOCP, constituting another flaw in the methodology. App. 34a-37a.

• Dr. Simon's opinions on causation were excluded because he is not qualified to give an opinion on medical causation. App. 36a-37a.

• Dr. Bernad's hypoxia theory was excluded because it is based on speculation (App. 37a-38a), which he admitted. JA 532.

• Dr. Hartman's pyridine theory was excluded because the underlying research was deemed unreliable and the matters sought to be proved were irrelevant. App. 38a.

The court then granted the motion for summary judgment.

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7. The four step methodology includes: (1) taking a patient history; (2) establishing a relationship between the course and pattern of an illness and a particular toxin; (3) obtaining evidence of exposure to the toxin; and (4) finding a biomarker of the illness. JA 242-243.

In addition to excluding various theories, the court ruled that Petitioners had failed to produce sufficient evidence to carry their burden on causation under Fed. R. Civ. P. 56(c) and under South Carolina law because of "significant inconsistencies" that had emerged from their side of the case. As a result, the court concluded that Petitioners were speculating on causation. App. 38a-39a. As further support for its ruling, the court noted that Petitioners failed to rule out all other inconsistent conclusions, specifically that Stephen Goewey fits within that category of pediatric neurological patients with disorders with no known cause. App. 39a-40a.[8]

The district court did not assess Dr. Lieberman's testimony, which is understandable in light of what had previously occurred. First, the court noted that the proposition that chlordane caused Stephen's condition had been abandoned by Petitioners. App. 21a n.5. Second, Dr. Lieberman's theory was not even worthy of inclusion in the summary compiled by Petitioners' "wrap up" expert, Dr. Hartman.

THE COURT OF APPEALS' DECISION. The Fourth Circuit affirmed the order granting summary judgment by 2-1 decision. After carefully reviewing the record, the court affirmed the district court's evidentiary exclusions. App. 7a. First, the court affirmed the exclusion of testimony of Drs. Garrettson, Abou-Donia and Simon relative to the TOCP theory of causation, primarily because of the absence of evidence of exposure. App. 7a-8a. The court agreed that neither Dr. Garrettson nor Dr. Abou-Donia had any knowledge of TOCP in the roof coating, and Dr. Simon's attempt to confirm it through the test on Mrs. Goewey's shirt was not confirmatory. App. 7a. The court also agreed with the finding of inconsistency, noting that the TOCP theory was "flatly rejected" by another one of Petitioners' experts, Dr.

8. In addition to the treating physicians cited by the court, Dr. Bernad testified that 50% of patients like Stephen Goewey go undiagnosed. JA 533.

Bernad. App. 7a. Next, the court affirmed the district court's exclusion of the alternate theory of causation proposed by Drs. Bernad and Hartman, citing the district court's characterization of the testimony as "insufficiently definitive," "speculative," "conjectural," and "inconsistent" and the inconsistency between the alternate theory and the primary (TOCP) theory. App. 8a. It is worth noting that the dissent did not take exception to any of the district court's *Daubert* exclusions.

The court then considered the remaining evidence, consisting of Dr. Lieberman's "difficult to follow" testimony. App. 9a. His testimony was ultimately determined to implicate toluene and chlordane, a characterization with which the dissent agreed. App. 9a; 14a. After noting the abandonment of the chlordane theory, the court could not find any evidence in the record to support Dr. Lieberman's assertions regarding toluene, while two of Petitioners' other experts had testified exactly the opposite. App. 9a-10a. Accordingly, Dr. Lieberman's testimony was deemed to be insufficient to withstand summary judgment. App. 9a.

The dissent relied exclusively on Dr. Lieberman's testimony in voting to reverse the grant of summary judgment. App. 10a. The thrust of the opinion seems to be that Dr. Lieberman's theory should be deemed reliable because of his assertions that he followed the scientific method. App. 12a-13a. Apparently, the Fourth Circuit was simply supposed to ignore the abandonment of the chlordane theory at the district court level, the absence of any research or data supporting his theory, and the criticisms and outright rejection of his theory by other experts on the same side of the case. Any inconsistencies in the testimony, even crucial inconsistencies emerging from the same side of the case that go to the foundation of his opinions, should be left up to the jury to resolve. App. 15a-16a.

REASONS FOR DENYING THE WRIT

I.

THE ARGUMENT FOR A HEIGHTENED STANDARD OF APPELLATE REVIEW WAS NOT PRESENTED TO OR RULED UPON BY THE FOURTH CIRCUIT.

The petition argues that this case presents the same question as *Joiner* relative to the standard of appellate review applicable to the district court's *Daubert* rulings. The "hard look" or "more stringent review" standard comes from *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995). Petitioners first indicated that a heightened standard of appellate review might apply to this case in a "Notice of Citation of Supplemental Authority," citing *Joiner*, filed after their reply brief in the Court of Appeals.[9]

Because it was first raised after the reply brief, the standard of review issue was not properly before the Court of Appeals. *Cavallo v. Star Enterprise*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3666 (U.S. 1997) (No. 96-1493) ("[A]n issue first argued in a reply brief is not properly before a court of appeals."). This Court ordinarily will not decide questions that were not properly raised in the lower courts. *Heller v. Doe*, 509 U.S. 312, 318 (1993); *Springfield v.*

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9. Petitioners' opening brief in the Court of Appeals makes a passing reference to *Paoli* under the section of the brief, required by Fed. R. App. P. 28(a)(6), stating the applicable standards of review: "To the extent summary judgment is based on admissibility of evidence, the standard is abuse of discretion, but to the extent the District Court's ruling turns on an interpretation of a Federal Rule of Evidence, or a question of law, review is plenary." (Citation omitted). Brief of Appellants at 4. Petitioners failed to brief the standard of review issue. Consequently, the issue is not addressed by the Fourth Circuit in its opinion.

Kibbe, 480 U.S. 257 (1987). The standard of review issue was not properly presented to and ruled upon by the Fourth Circuit; therefore, it should not be considered by this Court.

II.

THIS CASE SHOULD NOT BE HELD FOR A DECISION IN *JOINER* BECAUSE THE DISTRICT COURT'S EVALUATION OF EXPERT TESTIMONY COMPLIED WITH *DAUBERT*.

The petition does not contend that the district court's *Daubert* rulings were erroneous under the abuse of discretion standard. Even the dissent did not take issue with the district court's *Daubert* rulings, and in any event, misapplication of the appropriate standard of review by the Fourth Circuit would not ordinarily present an issue worthy of review. Sup. Ct. R. 10. Instead, the argument is that a more stringent review might have changed the result. Pet. at 16. Thus, if the proper standard of review is the "abuse of discretion" standard applied in this case, or the equally deferential "manifestly erroneous" standard, there is nothing for this Court to review on this issue.[10]

Moreover, there is no reason to hold this case for a decision in *Joiner*, because the district court's rulings were consistent with *Daubert*. Dr. Garrettson failed to satisfy two steps of his own methodology (exposure and course and pattern) when he proposed the TOCP theory. *Cf. Paoli*, 35 F.3d at 745 ("*[A]ny* step that renders the analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible. This is true*

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10. It has been noted that there is no practical distinction between the abuse of discretion and the manifestly erroneous standards. *United States v. Rahm*, 993 F.2d 1405, 1409-1410 (9th Cir. 1993); *United States v. Boney*, 977 F.2d 624, 628 n.2 (D.C. Cir. 1992); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 280 n.32 (5th Cir.), *cert. denied*, 484 U.S. 851 (1987).

whether the step completely changes a reliable methodology or merely misapplies that methodology.") (Emphasis in original). Dr. Abou-Donia's monoclonal antibody assay test, which was a cornerstone of his and Dr. Garrettson's opinions, had never been tested on a human being; it had never been published; and another one of Petitioners' experts, Dr. Bernad, criticized its reliability because of a lack of statistical analysis, a lack of information on false positives or negatives, and a lack of information on reproducibility. JA 541-542. *Daubert*, 509 U.S. at 593-594 (general acceptance, peer review, rate of error and lack of testing are proper considerations). Dr. Bernad admitted that he had to resort to speculation to make his theory work. *Id.* at 590 (scientific knowledge "connotes more than subjective belief or unsupported speculation."). Dr. Hartman relied on unconventional studies which attempted to establish a link between constituents of coal tar, a substance not involved here, and Parkinson's, a disease not involved here. *Id.* at 591-592 (discussing the requirement that expert testimony "fit" the facts of the case). Finally, Dr. Simon admitted that he is not qualified to give an opinion on causation. *Cf. Conde v. Velsicol Chemical Corp.*, 804 F. Supp. 972, 1026 (S.D. Ohio 1992) (excluding Dr. Simon's opinions on causation), *aff'd*, 24 F.3d 809 (6th Cir. 1994).

The district court evaluated the expert testimony consistently with *Daubert*, and the Fourth Circuit conducted an appropriate, careful review. Accordingly, there is no reason to hold this case for a decision in *Joiner*.

III.

THE FOURTH CIRCUIT'S EVALUATION OF THE SUFFICIENCY OF THE EVIDENCE ON CAUSATION IS CONSISTENT WITH DECISIONS OF THIS COURT ON SUMMARY JUDGMENT.

There being no disagreement with the district court's *Daubert* rulings, the Fourth Circuit's decision turned on one issue: whether Dr. Lieberman's testimony is sufficient to create a jury issue on causation. The petition essentially takes the same position as the dissent, arguing that Dr. Lieberman's testimony automatically creates an issue of fact because it was not excluded and because of his assurances of reliability. Actually, it is the position taken by Petitioners — that the existence of some expert testimony on their side of the case automatically creates a jury issue — that is out of touch with decisions of this Court relative to summary judgment, and specifically with what is indicated in *Daubert*.

The existence of some factual dispute does not necessarily create a jury issue. The issue of fact must be genuine. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 474 U.S. 574, 586 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). This is also true in cases involving scientific evidence. In *Daubert*, this Court cited *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir.), *cert. denied*, 506 U.S. 826 (1992), for the use of summary judgment as one of the "appropriate safeguards" where the evidence on causation is insufficient as a matter of law. *Daubert*, 509 U.S. at 826 ("[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free . . . to grant summary judgment, Fed. Rule. Civ. Proc. 56."). Thus, the mere fact that Dr.

Lieberman's testimony was not excluded does not mean that it creates a jury issue.

Nor was the Fourth Circuit required to accept the validity of Dr. Lieberman's theory based on his assurances. "[C]ourts have a duty to inspect the reasoning of qualified scientific experts to determine whether a case should go to the jury." *Turpin*, 959 F.2d at 1350. It is appropriate for the court to assess the foundation of the opinion. *Id.* The Fourth Circuit properly concluded that Dr. Lieberman's theory is nothing more than a personal opinion unsupported by evidence. App. 9a-10a.

Dr. Lieberman believes that chlordane or toluene caused Stephen's medical problems. App. 9a. The Fourth Circuit searched the record for evidence supporting these assertions and found none. *Id.* To the contrary, three of Petitioners' toxicologists — Drs. Garrettson, Abou-Donia and Bernad — rejected the chlordane theory outright, while a fourth — Dr. Simon — testified that the major components of Stephen's condition are inconsistent with chlordane poisoning.[11] App. 10a; JA 251, 403, 520, 963. The chlordane theory is so inconsistent with the facts of this case that it was abandoned by Petitioners in the district court.[12] App. 9a; 21a n.5.

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11. Dr. Bernad was particularly emphatic on his point: "I was specifically asked by counsel whether this could be chlordane. My answer to him was no, that this is not a chlordane induced neurologic disease. I probably have seen more patients and reviewed more data and know more about chlordane hydrocarbon insecticides/pesticides than anyone I know." JA 519.

12. After Petitioners settled with Velsicol, the manufacturer of the organochlorines to which Stephen was allegedly exposed, the USA asked for clarification of the chemical exposures at issue in this lawsuit. Counsel for Petitioners replied:

> In regard to the chlordane exposure, you are correct

(Cont'd)

Similarly, the record is devoid of any evidence that toluene, a component of the roof coating, is capable of causing Stephen's condition. One might expect to find some data on this "ubiquitous solvent" (JA 504); however, there is none. On the other hand, two of Petitioners' experts who actually did some research, Drs. Garrettson and Bernad, testified that nothing in the roof coating is capable of causing Stephen's condition. App. 10a, 39a.

The Fourth Circuit recognized that there is no support for Dr. Lieberman's theory other than his "own assertions." App. 9a. This is not a "jury argument." Pet. at 19. A personal opinion unsupported by evidence is insufficient to create a jury issue as a matter of law. *Turpin*, 959 F.2d at 1360. The Fourth Circuit's decision in this case with regard to the sufficiency of Dr. Lieberman's testimony is also consistent with other circuits that have ruled that an unsupported opinion is insufficient for admissibility purposes. *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 344-45 (7th Cir. 1995); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995); *Sorensen v. Shaklee Corp.*, 31 F.3d 638, 649 (8th Cir. 1994).

(Cont'd)

> that none of the organo chlorines are claimed by plaintiff presently to have proximately caused the severe neurological problems of Stephen.
>
> Dr. Simon's reports indicate there was indeed an exposure to chlordane, but Dr. Garrettson is equally clear that it is an organo phosphate exposure which caused the severe neurological problems. JA 1457-1459.

Petitioners' attempt to reassert chlordane as a substantial contributing factor in the Court of Appeals is an example of how the theories of causation shifted throughout this case.

IV.

SUMMARY JUDGMENT ALSO WAS PROPERLY GRANTED BECAUSE THIS CASE DOES NOT HAVE A RELIABLE SCIENTIFIC BASIS.

Two distinct arguments were made in support of the motion for summary judgment in the lower courts. First, FD argued the exclusion of expert testimony under *Daubert* and the insufficiency of the evidence that remained. App. 32a-33a. The Fourth Circuit affirmed the *Daubert* exclusions and determined that the evidence that remained, Dr. Lieberman's testimony, was insufficient to withstand summary judgment. If this Court declines to review these determinations, it need proceed no further.

The second argument for summary judgment also related to the sufficiency of the evidence, but on a broader basis. FD argued that Petitioners' evidence on causation is so inconsistent and methodologically flawed that it cannot provide a basis for a reasonable jury to find in their favor. When the testimony is considered as a whole, the evidence amounts to speculation. *Id.* The district court agreed. App. 38a-39a. The Fourth Circuit also agreed and affirmed on this basis as well. App. 8a. Predictably, the petition avoids a detailed discussion of the inconsistencies in their expert testimony. Instead, Petitioners argue through their "wrap up" witness that all of their experts are really saying the same thing. Pet. at 22. The testimony is significantly inconsistent, as the district court and the Fourth Circuit recognized:

1. Dr. Simon and Dr. Hartman indicated that the roof coating, sort of a "toxic soup" in itself, contains chemicals that could cause Stephen's neurological problems. On the other hand, Dr. Garrettson, who was highly touted as a board certified

medical toxicologist (Pet. at 9), and Dr. Bernad testified that none of the chemicals in the roof coating are capable of causing the problems. App. 39a.

2. Dr. Garrettson and Dr. Abou-Donia proposed the OPIDN/TOCP theory. However, Dr. Bernad testified that Stephen's condition is not consistent with OPIDN/TOCP from a neurological point of view. *Id.* Dr. Lieberman also indicated that the symptomatology is inconsistent with organophosphate poisoning. Furthermore, there was disagreement on whether the roof coating even contained TOCP. Dr. Garrettson testified that it did not, and this was confirmed by the manufacturer. App. 35a. On the other hand, Dr. Simon testified that TOCP "can be added" to the roof coating by the manufacturer, but his own test for TOCP was not confirmatory. App. 7a.

3. Dr. Bernad speculated that Stephen's condition could have resulted from hypoxia. Dr. Hartman testified that there is no evidence to support hypoxia. App. 39a.

4. Dr. Lieberman believes that toluene or chlordane could be responsible. His theories were refuted by a number of Petitioners' other experts.

The issue presented is not simply a matter of stating separate claims. The issue is whether the evidence is sufficient to allow a reasonable jury to find it more probable than not that the roof coating caused the condition. Where, as here, the experts on the same side of the case cannot agree on the most basic issues, such as whether Lowe's Asphalt Fibered Roof Coating is even capable of causing the condition, Petitioners have failed to provide the necessary foundation for their expert testimony, and to ask a jury to make such a determination would be asking for speculation. *Turpin*, 959 F.2d at 1360.

Petitioners' reliance on *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959) and *Tennant v. Peoria & Pekin R. Co.*, 321 U.S. 29 (1944) is misplaced. Neither is comparable from a factual or legal standpoint. Nor is this a "mosaic." This case is a "free-for-all," involving significant inconsistencies in expert testimony, methodological flaws, unconventional research and outright speculation. Two courts that have reviewed the evidence have decided that it should not be submitted to a jury. The lower courts have properly discharged their responsibilities under *Daubert*. Further review by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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